

At Commercial Division Part 1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the day of February, 2013.

P R E S E N T:

HON. CAROLYN E. DEMAREST,

Justice.

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ROBERT STANLEY, LLC,

Plaintiff

- against -

ORDER

ORANGE GENERAL CONTRACTING, INC.,
DAVID NAM and JASON LEE,

Index No. 9804/10

Defendants.

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This action, and the related case, *Rainbow Development, LLC v Orange General Contracting LLC*, (4223/2008), involves a dispute surrounding the alleged non performance of a construction contract. Plaintiffs in these actions bring, inter alia, claims of fraud and breach of contract against Orange General Contracting LLC (“Orange”) and David Nam and Jason Lee, the purported officers and owners of Orange, alleging that plaintiffs paid defendants down payments of over \$200,000 for work on a mixed-use building that was never completed. Defendants allege, among other things, that it is plaintiffs who have repudiated the agreement by withholding progress payments, and making work change orders that required more expensive materials that plaintiffs refused to pay for. The actions were originally filed on behalf of plaintiffs Rainbow Development, LLC and Robert Stanley, LLC, but on March 31, 2010 this Court granted a motion by defendants to sever and a motion by plaintiffs to serve an amended complaint to the extent that claims brought on behalf of Plaintiff Robert Stanley, LLC were severed from the initial

action and prosecuted under this separate index number, commenced on April 20, 2010.

After previous proceedings relieving plaintiffs' former counsel, Kathleen Bradshaw, Esq., appeared as counsel for plaintiffs. At a preliminary conference on February 9, 2011, signed Preliminary Conference Orders were issued to parties in connection with both cases; they included a Note of Issue filing date of September 7, 2011, for both cases along with warnings that failure to file the notes of issue by the date could result in dismissal of the actions.

After a number of appearances and adjournments, the parties appeared again on October 26, 2011, at which point the Note of Issue filing deadline was extended to January 31, 2012. Defendants' attorney subsequently moved to be relieved as counsel, and relief was granted at the appearance of January 18, 2012, at which Ms. Bradshaw failed to appear. By Order dated January 18, 2012, both cases were stayed until March 28, 2012, to provide time for one of the defendants to obtain another attorney. At this March 28, 2012 appearance, Lauren Varrone, Esq., an associate of Ms. Bradshaw's, appeared on behalf of Ms. Bradshaw for Plaintiff, and parties were told to sort out various document demands. However, at the subsequent appearance on June 6, 2012, it was noted that nothing had been done with regard to discovery since the previous appearance; Plaintiff had not submitted any default motions, nor had Plaintiff communicated with defendants regarding discovery. Ms. Varrone, who again appeared for Ms. Bradshaw, was warned that failure to prosecute the cases could result in dismissal.

Ms. Bradshaw did not attempt to resolve discovery issues during the months after this conference, but instead on the next scheduled appearance date, September 12, 2012, she filed a motion that same morning to compel the production of documents by defendants, or to strike defendants' answer and counterclaim, and for leave to reargue the motion to relieve defendant's

counsel. As a result, the conference was adjourned to November 14, 2012, the motion's return date. Ms. Bradshaw was admonished for wasting the Court's time.

Following arguments on Plaintiff's motion on November 14, 2012, this Court issued an order (the "November 2012 Order") dismissing Plaintiff's motion as meritless because counsel appearing for Plaintiff could not even identify the discovery Plaintiff sought to compel, and prior demands dating years back were deemed waived. The November 2012 Order also stated that "Plaintiff has failed to file a Note of Issue as directed. If Plaintiff wishes to pursue this case, an appropriate motion for relief shall be made returnable January 30, 2013. If no motion is made, this case will be deemed abandoned and dismissed without prejudice." The cases were adjourned to January 30, 2013.

On January 30, 2013, Ms. Varrone again appeared on Ms. Bradshaw's behalf for Plaintiff. It was noted that nothing had been done in the case since the previous November appearance, and no motion had been filed in compliance with the November 14 order.¹

Accordingly, pursuant to CPLR 3216, these actions are dismissed without prejudice. The Second Department has recently commented on the increasing failure of attorneys to comply with court-ordered deadlines (*see Arpino v F.J.F & Sons Electric Co., Inc.*, __ AD3d __, 2012 WL 6028883, at *4 [2d Dept 2012]). "The failure to comply with deadlines and provide good-faith responses to discovery demands 'impairs the efficient functioning of the courts and the

¹ At the January 30, 2013 appearance, Ms. Varrone represented that an attempt to file a motion had been made the previous afternoon, on January 29, 2013. Even if the Court were to credit such statements, of which there is no evidence of veracity, a motion attempted to be filed on the eve of a return date would be improper and could not have been "returnable" the following day, as directed in the November 14, 2012 Order (*see* CPLR 2214(b) (requiring service of notice of motion and supporting papers at least eight days before the time at which the motion is noticed to be heard)).

adjudication of claims”” (*Id.*) (quotations omitted).

Plaintiff failed to comply with the November 2012 Order, which expressly directed Plaintiff to file a motion returnable on January 30, 2013, or the actions would be dismissed. On January 30, Plaintiff had not filed a motion, nor taken any action since the November appearance. The note of issue date had passed a full year earlier. Defendant Lee’s attorney moved for enforcement of the November 2012 Order. Accordingly, the appropriate sanction is dismissal of the actions without prejudice (*cf. Arpino*, at *7) (defendants’ failure to meet clear court-ordered deadlines in a preliminary conference order for the production of discovery materials could not be tolerated, so defendants were subject to sanctions); *Bort v Perper*, 82 AD3d 692 [2d Dept 2011](case was rightfully dismissed for failure to comply with note of issue deadline ordered by compliance conference order and for repeated refusal to comply with court orders directing discovery).

It is well established in the Second Department that a compliance conference order containing a note of issue deadline and a warning that failure to file by the deadline may result in dismissal satisfies the 90-day notice requirement for an action to be dismissed pursuant to CPLR 3216 (*see Rocha-Silva v St. John’s Hosp.*, 70 AD3d [2d Dept 2010](action properly dismissed for failure by plaintiff to file note of issue by deadline in compliance order); *Mahler v Torres*, 25 AD3d 669 [2d Dept 2006](action warranted dismissal when plaintiff failed to comply with note of issue filing deadline set forth in the compliance conference order); *Koscinski v St. Joseph’s Medical Center*, 24 AD3d 421 [2d Dept 2005] (it was improper for Supreme Court not to dismiss action when plaintiff failed to file note of issue by the deadline directed in the compliance order). Plaintiff received the February 9, 2011 compliance orders directing that the notes of issue be filed

by September 7, 2011 and that failure to do so risked dismissal. The deadline was then extended to January 31, 2012. Plaintiff argued that the stay entered January 18, 2012, upon granting defendants' attorney's motion to be relieved, prevented compliance with the requirement to file the Note of Issue by January 31, 2012. While this argument is correct, the stay only remained in effect until March 28, 2012. No attempt was made to obtain a further extension. The November 14, 2012 order was not entered until eight months later and directed plaintiff to act prior to January 30, 2013, a full year lag on the existing note of issue date, or risk dismissal. When given the further opportunity to obtain relief by January 30, 2013, Plaintiff failed to act.

Moreover, Ms. Bradshaw has repeatedly shown a disrespect for opposing counsel and this Court by failing to appear or by appearing hours after the Court's 9:45 A.M. call time. For example, on December 9, 2009, she did not arrive in the courtroom until 12:00 P.M. After numerous adjournments, the next appearance was rescheduled for March 31, 2010. Ms. Bradshaw failed to appear when the case was called into the record, but instead, arrived at the courtroom at 11:45 A.M., at which point the case had to be re-called. At the next appearance on June 2, 2010, Ms. Bradshaw failed to appear altogether. On September 15, 2010, Ms. Bradshaw again failed to appear until 11:30 A.M. and was admonished and told to appear on time in the future. At the next appearance on November 10, 2010, Ms. Bradshaw failed to appear when the motion was called onto the record. She ultimately arrived in the court room at 12:20 P.M. and was told that the motion had been adjourned.

By letter of November 16, 2010, parties were informed of the next scheduled conference appearance on January 12, 2011; on that date, attorneys who had not previously appeared for both parties appeared and admitted that no discovery had taken place. The case was adjourned for

February 9, 2011, and the attorneys were directed that an attorney with knowledge of the case and authority must appear (*see* 22 NYCRR 202.70 Rule 1). At that appearance, Ms. Bradshaw was present in the morning, but when the case was re-called into the record in the afternoon, she did not appear. She did finally reappear in the courtroom at 3:45 P.M. Plaintiff's lack of diligence and failure to adhere to court rules would, at the least, justify sanctions.

Pursuant to CPLR 3216, because of Plaintiff's repeated failure to comply with Court orders, the actions are dismissed without prejudice for failure to prosecute.

The foregoing constitutes the decision and order of the Court.

E N T E R:

HON. CAROLYN E. DEMAREST, J.S.C.